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Nos. 06-84 & 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

CHARLES BURR, *et al.*,

Respondents.

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE INSURANCE COMMISSIONERS OF THE STATES OF DELAWARE, ARKANSAS, CALIFORNIA, GEORGIA, IOWA, KANSAS, MICHIGAN, MONTANA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, UTAH AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

This brief is submitted in support of respondents Charles Burr, Shannon Massey and Ajene Edo on behalf of thirteen state insurance commissioners: (1) Matthew P. Denn, the Insurance Commissioner of Delaware; (2) Julie Benafield Bowman, the Insurance Commissioner of Arkansas; (3) John Garamendi, the Insurance Commissioner of California; (4) John W. Oxendine, the Insurance Commissioner of Georgia; (5) Susan E. Voss, the Insurance Commissioner of Iowa; (6) Sandy Praeger, the Insurance Commissioner of Kansas; (7) Linda A. Watters, the Insurance Commission of Michigan; (8) John Morrison, the Insurance Commissioner of Montana; (9) Morris J. Chavez, Superintendent of the Insurance Division of the New Mexico Public Regulation Commission; (10) Jim Poolman, the Insurance Commissioner of North Dakota; (11) Kim Holland, the Insurance Commissioner of Oklahoma; (12) D. Kent Michie, the Insurance Commissioner of Utah; and (13) Mike Kreidler, the Insurance Commissioner of Washington (collectively "the Amici State Insurance Commissioners").

This case involves the interpretation of provisions of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, that directly impact the millions of consumers who purchase and renew insurance policies every year. The statutory provisions at issue govern the rights of consumers and the responsibilities of insurance companies with respect to the use of consumer credit information in the underwriting and rating process.

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1. Written consents of all parties have been filed with the Clerk. This brief was authored in whole by counsel for the amici curiae. No party or his/her/its counsel authored the brief in whole or in part, and no person or entity other than the amici curiae made any monetary contribution to the preparation or submission of the brief.

One of the most important missions of the Amici State Insurance Commissioners (and other state insurance commissioners) is to ensure reliable insurance coverage at reasonable rates for consumers. Because a growing number of personal auto and homeowners insurance companies use consumer credit information when deciding whether to issue or renew coverage and when deciding what prices to charge for coverage, the Amici State Insurance Commissioners have undertaken to educate the public about the use of credit scores in the underwriting process and to protect the public by implementing and enforcing policies that promote the responsible and accurate use of consumer credit information.

This case represents an opportunity for the Amici State Insurance Commissioners to further their collective mission of protecting consumers by supporting interpretations of the FCRA that (a) put valuable information in the hands of consumers, (b) provide appropriate incentives for insurance companies that use consumer credit information to adopt procedures that assure compliance with the law, and (c) hold insurance companies accountable when they adopt policies that recklessly disregard consumer rights in contravention of the FCRA.

SUMMARY OF ARGUMENT

The Ninth Circuit correctly determined that the defendant insurance companies were not entitled to summary judgment on the plaintiffs' claims that the insurance companies' failure to send them "adverse action" notices under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, could warrant the enhanced remedies that § 1681n provides when a person covered by the statute has "willfully failed to comply" with any of the statute's requirements.

This Court has long held that "willful" violations of civil statutes encompass both "knowing" noncompliance and "reckless disregard" for whether one's conduct complies with a statutory obligation. The Ninth Circuit's decision that the enhanced remedies of § 1681n could be triggered by an insurance company's "reckless disregard" for whether a chosen interpretation of the FCRA's requirements complied with the statute was therefore correct.

The Ninth Circuit's description of the types of conduct that could satisfy a "reckless disregard" standard was likewise correct. The court's description would not permit liability under § 1681n for conduct that is merely negligent. A credit information user who purposely relies on "creative lawyering" to provide "creative" but "indefensible" answers to questions about the extent of the user's obligations under the FCRA is not acting negligently. It is acting in conscious or reckless disregard of what the statute requires.

The Ninth Circuit also correctly determined that petitioner GEICO's policy, in place between 1999 and 2002, for determining what constitutes an "adverse action" had no basis in the statute and could amount to a "willful" violation of the FCRA.

This Court should affirm the Ninth Circuit because its decision is consistent with the FCRA's underlying policy of consumer protection. The statute itself provides that credit reporting agencies and users of credit information bear "grave responsibilities" to act fairly and accurately and to respect the rights of consumers. The Ninth Circuit's decision provides appropriate incentives to assure compliance with the statute's requirements.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISIONS TO REVERSE THE GRANTS OF SUMMARY JUDGMENT WERE CORRECT AND SHOULD BE AFFIRMED

The Ninth Circuit's decisions in *Edo v. GEICO Casualty Co.* and *Burr v. Safeco Insurance Co. of America* should be affirmed because they correctly determined that the defendant insurance companies in those cases were not entitled to summary judgment on the plaintiff consumers' claims that the "adverse action" policies that resulted in Messrs. Edo and Burr and Ms. Massey not being sent "adverse action" notices failed to comply with the requirements of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*

In Mr. Burr's and Ms. Massey's cases, petitioner Safeco Insurance Company of America and its related companies ("Safeco") did not consider that Safeco had taken an "adverse action" against these consumers under § 1681a(k)(1)(B)(i), when different Safeco companies quoted them an insurance premium that was higher than the premium that the company would have quoted if their credit information had been better, because the particular company had never quoted an insurance premium to Mr. Burr or Ms. Massey before, and Safeco had concluded that it did not need to send "adverse action" notices when it made an initial quote to a new customer.

In Mr. Edo's case, petitioner GEICO Indemnity Company and its related companies ("GEICO") did not consider that GEICO had taken an "adverse action" under the same provision, § 1681a(k)(1)(B)(i), because, when GEICO compared the automobile insurance premium that its

underwriting formula determined was appropriate for Mr. Edo (based, in part, on his credit score) to the premium that would have been charged to someone who had what GEICO considered to be an "average" credit score, the premium using his actual credit score was the same.

Each of these decisions that an "adverse action" within the meaning of the FCRA had not occurred – and that therefore an "adverse action" notice need not be sent – was based on the insurance companies' respective interpretations of the extent of their obligations under the FCRA. In particular, the decisions were based on the insurance companies' respective policies or practices as to what circumstances required that an "adverse action" notice be sent to a customer or prospective customer, informing him or her that the insurance company's use of the person's credit information had adversely affected the premium the customer would be charged.

In each case, the trial court granted summary judgment for the insurance company defendants because it concluded that the insurance companies' interpretations of their obligations under the FCRA were correct.

The Ninth Circuit reversed the grants of summary judgment on the basis that the insurance companies' interpretations of their obligations under the FCRA were inconsistent with the plain language of the statute. *See Reynolds v. Hartford Financial Services*, 435 F.3d 1081, 1092-93, 1097-1100 (9th Cir. 2006); *Spano v. Safeco Corp.*, 140 Fed. Appx. 746, 747 (9th Cir. 2005). It also concluded that, because some of the proffered interpretations were "implausible," the cases should be remanded to the trial court for a determination of whether the insurance companies'

respective failures to comply with the FCRA's "adverse action" requirements were "willful" – thereby triggering the enhanced remedies of § 1681n. *Id.*

On the issue of what could constitute a "willful" failure to comply under § 1681n, the Ninth Circuit said:

> Each of the defendants asks that we affirm the district court's grant of summary judgment on the alternative ground that, as a matter of law, its conduct was not willful. We must first define "willfully" as it appears in FCRA. Interestingly, there is no legislative history to explain what Congress intended by the use of that term.
>
> We begin by following all five of the other circuits that have addressed the issue of the mens rea that is required with regard to the *act* that allegedly violates FCRA and hold that the act must have been performed "knowingly and intentionally." Additionally, we adopt the position of four of the five other circuits and hold that, although the act must be intentional, it need not be the product of "malice or evil motive."
>
> Next, we address the more difficult question: What is the nature of the mens rea that is required with respect to the law? Here, we follow the Third Circuit. Specifically, we hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the

policy [or action] contravened those rights." [citing *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3rd Cir. 1997)] We adopt this holding for two principal reasons.

First, we believe that the Third Circuit's definition best comports with Supreme Court precedent. The Court has consistently stated that willfulness for civil liability requires either knowledge or reckless disregard with respect to whether an action is unlawful.

* * *

Second, the Third Circuit's approach best furthers the purposes and objectives of the Act. It is fair and balanced; it is practical as well. It avoids the two extremes of excusing noncompliance even though the answer to a previously undecided question is objectively apparent and imposing liability notwithstanding a truly excusable inability to predict future developments in the evolving construction of a statute by the courts. It encourages companies that use consumer credit reports to make the necessary effort to inform themselves fully and fairly as to their statutory obligations and, as a result, to carry out the statutory mandate of ensuring that consumers are notified when their credit information has been used against them. Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate

purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute.

In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless disregard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.

435 F.3d at 1097-99 (citations and footnotes omitted).

Petitioners and the insurance industry amici that support their position paint the Ninth Circuit's decision as "expansive and unprecedented," Brief for Petitioners in 06-100 ("Safeco Br."), at 1, "eccentric and wrongheaded," Brief of Mortgage Insurance Companies of America as Amicus Curiae in Support of Petitioners in 06-82, 06-84, 06-100 and 06-101 (Aug. 21, 2006), at 4, and inconsistent with what they describe as "twenty years of settled judicial interpretation" by federal courts of appeals that a "willful" failure to comply with any of the FCRA's requirements can be demonstrated only with evidence that the failure to comply was "knowing," *see* Safeco Br. at 27.

By contrast, the United States agrees with the Ninth Circuit that "reckless disregard" for whether a chosen interpretation of the FCRA's requirements violates the rights of affected consumers can support a finding of willfulness under § 1681n. *See* Brief of the United States as Amicus Curiae in Support of Vacatur in No. 06-84 and Reversal in 06-100 ("United States Br."), at 8-20. The United States asserts, however, that the standard for "reckless disregard" that the Ninth Circuit described is incorrect because it is too close to a negligence standard. *Id.* at 20-24.

The Amici State Insurance Commissioners urge the Court to affirm the Ninth Circuit because its construction of the FCRA provisions at issue in these cases was correct under the law and because the standards it adopted will more effectively implement Congress' intent that users of consumers' credit information act in ways that "assure compliance," 15 U.S.C. § 1681m(c), with the statute's requirements.

A. This Court Has Long Held That "Willful" Violations of Civil Statutes Encompass Both "Knowing" Noncompliance and "Reckless Disregard" for Whether One's Conduct Complies With a Statutory Obligation

Nearly twenty-two years ago, this Court concluded that the enhanced remedies that the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, provides for "willful" violations of that statute – *i.e.*, double damages – could be triggered when a defendant acted either knowing that its conduct violated the ADEA or in reckless disregard of whether its conduct violated the statute. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 11 (1985).

Three years later, the Court again concluded that the use of the word "willful" in a civil statute – in that case, the statute of limitations provision in the Fair Labor Standards Act, 29 U.S.C. § 255(a) – encompassed both knowing and reckless conduct. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). The Court said:

> In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional." See Roget's International Thesaurus § 622.7, p. 479; § 653.9, p. 501 (4th ed. 1977). The word "willful" is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in *Thurston*—that the employer either knew or showed reckless disregard for the matter of

> whether its conduct was prohibited by the statute—is surely a fair reading of the plain language of the [Fair Labor Standards] Act.

486 U.S. at 133.

In the face of these two decisions by this Court on what can constitute a "willful" violation of other civil statutes, the Ninth Circuit's determination that the use of the term "willfully" in § 1681n of the FCRA encompasses both knowing and reckless conduct is neither unprecedented nor extreme. This Court decided *Thurston* in 1985. To the extent that there have been courts of appeals that have limited the scope of "willful" noncompliance with the FCRA's requirements to knowing noncompliance in the last twenty years, as petitioners argue, those decisions have ignored this Court's decisions in *Thurston* and *Richland Shoe.*

Even if the Court were to look at the context of the other provisions of the FCRA to see if Congress intended a different meaning for the word "willfully" in § 1681n, *see, e.g., United States v. Murdoch*, 290 U.S. 389, 395 (1933) ("willful" must be interpreted in the context of the statute's other provisions), there are no fewer than four other places in the FCRA where Congress expressly required that conduct be "knowing and willful" or "knowing" to trigger some civil or criminal consequence. *See* 15 U.S.C. §§ 1681n(a)(1)(B), 1681q, 1681r, 1681s(a)(2)(A). By limiting enhanced liability under § 1681n(a)(1)(A) – the provision at issue in these cases – to "willful" failure to comply, Congress plainly intended something less than the "knowing" standard that petitioners espouse. The Ninth Circuit's decision correctly recognized this and should be affirmed.

B. The Ninth Circuit's "Reckless Disregard" Standard Does Not Permit the Enhanced Remedies of Section 1681n For Conduct That Is Merely Negligent

Petitioners and the United States assert that the Ninth Circuit's standard for what could constitute a "reckless disregard" for a credit information user's obligations under the FCRA was too lax and would impose enhanced liability for conduct that is merely negligent. The Ninth Circuit, however, properly recognized that "willful" noncompliance must be more than mere negligent noncompliance. Its elaboration of what types of conduct *could* constitute 'willful" noncompliance – thereby meriting further development of a factual record in the trial court – demonstrates that it was, in fact, limiting its "reckless disregard" standard to purposeful conduct directed at adopting indefensibly restrictive interpretations of a credit information user's obligations under the FCRA.

To be sure, this Court has previously rejected a standard for "reckless disregard" of a defendant's statutory obligations that would impose liability if the defendant acted without a reasonable basis for believing that it was complying with the statute. *McLaughlin v. Richland Shoe Co.*, 486 U.S. at 134-35. The Court said that such a standard would "permit a finding of willfulness to be based on nothing more than negligence." *Id.* at 135. But the Ninth Circuit did not adopt such an "acting without a reasonable basis" standard.

Rather, the Ninth Circuit made clear that a finding of "reckless disregard" could be based on conduct it described as follows:

> Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse

> incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute. . . .
>
> A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.

435 F.3d at 1099. A credit information user who purposely relies on "creative lawyering" to provide "creative" but "indefensible" answers to questions about the extent of the user's obligations under the FCRA is not acting negligently. It is not merely acting without a reasonable basis for believing that its conduct complies with the statute. It is acting in conscious or reckless disregard of what the statute objectively

requires. Such a standard is not too lax for "reckless disregard" and does not expose a credit information user to the enhanced remedies of § 1681n for conduct that is merely negligent.

C. The Ninth Circuit Correctly Determined That GEICO's Policy of Comparing the Premium to be Charged After Considering a Consumer's Credit Score With the Premium That Would Be Charged Someone With an "Average" Credit Score Cannot Be Justified Under the FCRA

GEICO's petition also raises the issue of whether the Ninth Circuit erred in determining that GEICO's adverse action notice policy – in place between 1999 and 2002 – violated the FCRA. Under that policy, GEICO sent an "adverse action" notice only to a consumer whose insurance premium, which GEICO calculated in part by considering the person's credit score, turned out to be higher than the premium that would have been charged if the person had what GEICO considered to be an "average" credit score.

In rejecting this "adverse action" policy as plainly inconsistent with the requirements of the FCRA, the Ninth Circuit explained:

> The GEICO Companies contend that their method of determining which consumers were entitled to receive adverse action notices comported with FCRA, while Edo asserts that under GEICO's procedure numerous consumers who were charged increased rates because of their credit rating failed to receive the statutorily required notice. At the time Edo sought an initial insurance policy, it was GEICO's practice to send an adverse action notice

> to a consumer only if the use of his actual credit information resulted in his placement with an entity and tier that provided a higher insurance rate than the entity and tier to which he would have been assigned if "neutral" or average credit information had been used instead. In short, it was GEICO's policy to send adverse action notices only to some of the consumers who would have received more favorable rates had they enjoyed a better credit rating. Specifically, notices were sent only to those with below-average credit who would have been charged a lower rate for insurance had they received an average credit rating. GEICO contends that only in such circumstance has an adverse action occurred. GEICO is incorrect.
>
> FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average consumer's.

435 F.3d at 1092-93.

This decision is plainly correct. The FCRA requires that an "adverse action" notice be sent to any consumer whose insurance premium is adversely affected by the insurance company's use of his or her credit information. There is absolutely no basis in the statute for a policy that reduces the number of "adverse action" notices to be sent to consumers by artificially comparing the premium a consumer was actually charged after considering his or her credit score and the premium he or she would have been charged if he or she had an "average" credit score.

II. THE POLICY OF CONSUMER PROTECTION UNDERLYING THE FCRA REQUIRES A LIBERAL INTERPRETATION OF "WILLFUL NONCOMPLIANCE"

A Congressional policy of consumer protection lies at the heart of the FCRA, which was expressly enacted to fulfill "a need to ensure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681; *see also St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 883 (5th Cir. 1989) (FCRA the product of Congressional concern over abuses in the credit reporting industry). This need has only become greater over time, as the use of consumer credit information has expanded dramatically beyond the banking system to affect consumers in such critical areas as insurance, employment, and housing. *See, e.g.*, Michael Epshteyn, *The Fair and Accurate Credit Transactions Act of 2003: Will Preemption of State Credit Reporting Laws Harm Consumers?*, 93 Geo. L.J. 1143, 1150 (2005).

As one commentator has put it:

> [T]he FCRA provides a comprehensive system for regulating the dissemination and use of credit information, addressing both the permissible activities of those who utilize credit information as well as their responsibility to ensure the accuracy of the data they employ. The system is not without tension, however, between the needs of consumers, who are the primary subjects of the credit reporting system (but not its principal paying customers), and the requirements of the

> lenders, furnishers, and credit bureaus, who rely on the system for their day-to-day business operations. Consumers' paramount concern is likely to be the accuracy of their files, especially given the significance of credit reports in securing loans, housing, and employment. By contrast, creditors and credit reporting agencies, who deal with millions of credit reports each day, might be willing to sacrifice some measure of accuracy in exchange for speed and low cost.

Id. at 1149-50.

The cost of inaccuracies in credit reports is high for consumers, who may be denied products or services altogether on the basis of inaccurate information, or who may be subject to higher rates for products and services, like insurance, that are priced based on some calculated perception of the consumer's risk ("risk-based pricing"). *See* Fed. Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 (2004) at 11.

A case in point is that of James Fry, a Delaware citizen who contacted the Insurance Commissioner after receiving notice of a proposed annual increase in his homeowner's insurance premium that he believed to be inordinately high. *See* Del. Ins. Commr. and Dept. of Ins. Press Release, Oct. 25, 2005, *available at* http://www.state.de.us/inscom/departments/news/102405-Press-Hartford.shtml. When Mr. Fry asked the insurance company for an explanation of the rate increase, he was told that $43 of the $226 increase was a result of expanded coverage. The remainder, he was told, was the result of his having been placed in a higher-priced

"rating tier" based on his credit score. *Id.* After investigation, it was discovered that the insurance company had not correctly used its own credit scoring formula in Mr. Fry's case. *Id.* While the company had used negative credit factors to assign policyholders to a higher risk category, it was failing to use the positive factor of not having any outstanding credit card or loan balances to assign policyholders to a lower risk category. *Id.* Mr. Fry had no outstanding balances on his credit report, but this fact was not counted in his favor when his rate was calculated. *Id.* He ultimately received a $180 credit for the premium he overpaid as a result of the flawed calculation. *Id.* Moreover, approximately 1,400 other policyholders in Delaware received credits or refunds totaling $135,000 from the same insurer to correct errors resulting from incorrect use of their credit scores. *Id.*

Because the FCRA was enacted with the goal of protecting consumers like Mr. Fry and promoting the accurate and responsible use of their credit information, the provisions of the Act should be interpreted liberally in favor of providing consumers with the requisite notice when the prices they are being charged or quoted are adversely affected because of their credit information. *See Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 964 (6th Cir. 1998); *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Accordingly, the Court should interpret § 1681n to impose a burden of compliance on users of consumer credit information that is commensurate with the expansive and "vital role," 15 U.S.C. § 1681(a)(3), they now play in both the national economy and the lives of individual consumers. "Willful" noncompliance within the meaning of § 1681n should be held to include not only policies or actions that knowingly contravene consumers' rights under the FCRA, but also policies or actions that recklessly disregard those rights. *See Reynolds*, 435 F.3d at 1098-99 (citing *Cushman*, 115 F.3d at 227).

III. THE FCRA SHOULD BE CONSTRUED TO PROVIDE APPROPRIATE INCENTIVES FOR USERS OF CREDIT INFORMATION TO RESPECT AND PROTECT THE RIGHTS OF CONSUMERS

The Congressional statement of purpose in the FCRA recognizes the danger that fairness and equity to consumers will be subjugated to the enormous commercial demand for consumer credit and other personal information. *See* 15 U.S.C. § 1681(b). To prevent the information needs of businesses from taking precedence over the personal needs of consumers, Congress required consumer reporting agencies to "adopt reasonable procedures" for assuring compliance "with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." *Id.*

Such a burden is particularly necessary with regard to the requirement of providing an "adverse action" notice to consumers when the prices they are being charged or quoted have been adversely affected by their credit information or their credit score. Although, as in Mr. Fry's case, an unusual increase in an insurance premium and a determined consumer may bring errors or noncompliance to light, noncompliance with the "adverse action" notice requirements will more typically be difficult to identify because, by definition, those consumers affected by a credit user's noncompliance will *not* have received a notice.

Petitioner Safeco argues, however, that, in requiring the adoption of merely "reasonable" procedures, Congress intended to impose nothing more than a negligence standard on any violator of the FCRA who is not a "true malefactor." Safeco's Br. at 32-33. It argues that the Ninth Circuit's

decision would impose the enhanced remedies of § 1681n on "companies that simply guess wrong" about the scope of their obligations under the Act. *Id.* at 33. This view is incorrect.

First, the Ninth Circuit made clear that a defendant would not be liable under § 1681n "if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute." 435 F.3d at 1099.

Second, and perhaps more importantly, the "grave responsibilities" that Congress concluded credit reporting agencies and users of consumer credit information bear to act fairly and to respect the rights of consumers plainly do not permit these sophisticated commercial enterprises to "guess" about the scope of their obligations under the FCRA. The strong language Congress chose to describe how credit reporting agencies and users of credit information might protect themselves from liability demonstrates that Congress intended to impose a burden on these businesses that was commensurate with their "grave responsibilities" of fairness, accuracy and respect for consumer rights. Thus, consumer reporting agencies are required to follow reasonable procedures "to assure maximum possible accuracy." 15 U.S.C. § 1681e(b). A user of credit information can be excused for failure to send the required "adverse action" notice if it demonstrates that it had reasonable procedures in place "to assure compliance" with the requirements of the statute. *Id.* § 1681m(c). Congress did not say "reasonable procedures to promote substantial compliance." It said "to assure compliance." Guessing is not allowed.

Over the three decades since the enactment of the FCRA, the Act's promise of fairness and equity to consumers in the credit reporting process has not been fulfilled. Studies designed to evaluate rates of error in consumer reports have consistently shown that failure to comply with the FCRA's requirements concerning the fair and accurate reporting and use of consumer credit information is a serious and ongoing problem. For example, a study conducted by the U.S. Public Interest Research Group in 2004 found that one in four (25%) of the consumer reports surveyed contained "serious" errors that could result in the denial of credit or other adverse consequences. *See* Fed. Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 (2004) at 23. Over half (54%) of the consumers responding to the survey reported finding inaccurate personal identifying information in their reports, including name misspellings, incorrect birth dates, out-of-date addresses listed as current, and incorrect addresses. *Id.* Over a fifth (22%) of consumers reported that a mortgage or other loan appeared twice. *Id.* Almost a third (30%) said that their reports listed as open an account that they claimed had been closed. *Id.* In all, nearly eight in ten (79%) of the consumer reports surveyed contained an error of some kind. *Id.*

Abuses and inaccuraeies in the credit reporting system remain rampant. In light of the persistence of such abuses and inaccuracies, the FCRA should be interpreted to create appropriate incentives for the users of credit information to treat consumers fairly, use and report their credit information accurately and responsibly, and adopt policies and procedures that will assure compliance with the statute. The Ninth Circuit's decision does that – in ways that are consistent with Congress' purpose and intent in enacting the FCRA.

Exposing those whose chosen policies or actions recklessly disregard the rights of consumers to damages for willful noncompliance under § 1681n will motivate compliance and encourage credit information users to maintain the proper balance between their business needs and the needs and rights of consumers. This motivation is especially important given the tremendous imbalance of power, sophistication and resources that exists between the businesses that sell and use consumer credit information and individual consumers. Balancing the needs of credit information users and the rights of consumers in an economic environment in which the resources of credit information users greatly exceed those of individual consumers requires placing a high burden on information users to "exercise their grave responsibilities," 15 U.S.C. § 1681(a)(4), in compliance with the FCRA.

CONCLUSION

For the reasons stated above, the decisions of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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